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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.574 OF 2003

Lalchand B. Patil
r/o. Village Ghesar, Tal.Kalyan
Dist.: Thane ... Appellant

V/s.

The State of Maharashtra
(at the instance of Taloja P.Stn.) ... Respondent

Mr.P.P. Hudlikar for Appellant
Mr.P.A. Pol, APP, for Respondent

a/w

CRIMINAL APPEAL NO.575 OF 2003

Kisore R. Gaikwad
r/o. village Walkan,
Dist.: Thane ... Appellant

V/s.

The State of Maharashtra
(at the instance of Taloja P.stn.) ... Respondent

Mr.Rahul Thakur for Appellant
Mr.P.A. Pol, APP, for Respondent

CORAM: **D.G. DESHPANDE &**
SMT.NISHITA MHATRE, JJ.

JUDGEMENT RESERVED ON: **MARCH 20, 2007**
JUDGEMENT PRONOUNCED ON: **MARCH 29, 2007**

JUDGMENT (PER SMT.NISHITA MHATRE, J.):

. These two appeals have been filed to challenge the judgment and order of the I Adhoc Additional Sessions Judge, Raigad-Alibaug dated 31.3.2003. Appeal No.574 of 2003 has been preferred by accused No.1 before the trial Court and Appeal No.575 of 2003 has been filed by accused No.3. Both these appeals have been heard

together. The appellants had been arraigned as accused together with three other persons in Sessions Case No.207 of 1998. The present appellants have been convicted for offences punishable under section 302 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life. Accused No.3 has also been convicted for the offence punishable under section 5 r/w 27(1) of the Arms Act and has been convicted and sentenced to suffer rigorous imprisonment for three years. Accused No.1 has been acquitted of the offences under the Arms Act. The other accused namely accused Nos.2, 4 and 5 were acquitted of all the offences for which they were charged.

2. The case of the prosecution is that one Mukund Janu Mhatre who was the Sarpanch of village Khatari was running a brick kiln business. On 1.12.1997, at about 11 am, the victim Mukund was walking towards the S.T. stand with his nephew Sitaram. His brother, Kushendra was standing at the bus stop. He noticed Sitaram proceeding towards the brick kiln while Mukund walked towards the village. Three persons riding a Yamaha motor cycle stopped near the victim. Two persons got off the pillion seat of the motor cycle. Gun shots were fired at Mukund as a result of which he collapsed on the road. Kushendra rushed to the victim’s aid when shots were also fired at him. He managed to avoid those shots. Kushendra and Sitaram took the victim to the

Municipal dispensary in Panvel in an auto rickshaw. On reaching the hospital, he was declared dead before being admitted to the hospital. Kushendra then lodged a complaint with the police against unknown persons. The complaint was registered and the police carried out investigations commenced. The accused No.1 was arrested on 31.12.1997 while accused No.3 was arrested on 14.1.1998. They and the other 3 accused were all charged for having committed the offences punishable under sections 302, 307 r/w 34 of the Indian Penal Code as also section 7 r/w sections 25(1)(a) and 5 r/w section 27(1) of the Arms Act. Their trial was committed to Sessions. The I Adhoc Additional Sessions Judge, Raigad-Alibaug has convicted and sentenced the accused as aforesaid.

3. The prosecution has relied on the evidence of 6 witnesses, three of whom were eye witnesses, i.e., PW2, PW4 and PW5. PW1 is the Special Executive Officer, who conducted the Test Identification Parade. PW3 is the Medical Officer who performed the autopsy. PW6 is the Investigating Officer. With the assistance of the learned Assistant Public Prosecutor and the learned Advocates appearing for the accused-appellants, we have scrutinised the evidence on record and the impugned judgment. We have independently assessed the evidence on record and have drawn the same conclusions which were reached by the Sessions Court.

4. PW1 who conducted the Test Identification Parade has stated that accused No.1 was identified by PW4 and PW5 whereas PW2 and PW4 have identified accused No.3. The role attributed to accused No.1 by the eye witnesses is that he was riding the motor cycle with accused No.3 as the pillion rider. Another person was also riding on the pillion seat of the motor cycle. All the eye witnesses have stated that while accused No.3 wounded the victim with gun shots, accused No.1 continued to sit on his motor cycle. PW2 and PW4 have stated that while the gun shots were being fired, accused No.1 who was seated on the motor cycle turned it towards Mumbra and sped away with accused No.3 after the incident. PW4 who was also present at the scene of offence has corroborated the testimony of PW2 in respect of the role played by accused No.1. This witness has stated that he was able to identify accused No.1 because he was related to his grandson. However, he has also admitted in his cross-examination that he identified accused No.1 in the test identification parade because he was shown the photographs of accused No.1 by the police prior to the identification parade. Similarly, PW5 has corroborated the depositions of PW2 and PW4 as regards the role attributed to accused No.1. Therefore, the prosecution has proved that accused No.1 rode the motor cycle with accused No.3 as the pillion rider. He continued to sit

on the motor cycle while accused No.3 got off the motor cycle and fired shots at the victim. Accused No.1 then turned the motor cycle around and sped away with accused No.3 towards Mumbra. During the entire incident accused No.1 had kept engine of the motor cycle running.

5. PW2 and PW5 have both spoken of accused No.3 firing shots at the deceased. PW2 Kushendra and PW5 Sitaram have both stated that when they went to assist the victim, shots were fired at them as well, which they successfully evaded. PW4, however, has not spoken about the shots being fired in the direction of PW2 and PW5. At the same time, he has categorically stated that he saw shots being fired at the victim, by a person who got off the motor cycle. He has been unable to identify accused No.1 in Court who he says was riding the motor cycle.

6. PW5 has also stated that accused No.3 fired the shots at the victim. According to this witness and PW2, two persons had fired shots at the deceased, one of whom was accused No.3. Thus, the role attributed to accused No.3 has been established by the prosecution. It was he who had fired the shots at the deceased and had also tried to shoot PW2 and PW5.

7. The Medical officer who has been examined as PW3 has stated that the deceased had sustained 9 fire arm

injuries on his person. His lungs were lacerated. Gun shot holes were also found on the chest and other parts of the body. According to the Doctor, 2 to 3 injuries could be caused by one bullet but he admitted that in the present case, there were no such injuries. The witness recovered 3 bullets from the corpse. The Investigating Officer who has been examined as PW6 has stated that the bullets recovered were sent for analysis to the chemical analyser. The report from the chemical analyser shows that the three bullets recovered tallied with each other showing that they had been fired from a single .38" special revolver having five lands and five grooves with right hand twist of riflings. The fire arm used has not been recovered. However, the ocular evidence on record which is supported by the medical evidence and corroborated by the report of the Chemical Analyser proves the case of the prosecution that the death of the victim was homicidal and that it was accused No.3 who had fired the shots at the victim.

8. The next question which we would have to consider is whether the accused No.1 had the common intention with the accused No.3 to kill the victim. The learned Advocate appearing for accused No.1 has submitted that if the only role attributed to accused No.1 by the witnesses is that he was riding the motor cycle on which accused No.3 was the pillion rider, accused No.1 could not be ascribed with the intention to

kill the victim or the knowledge that accused No.3 intended to kill him. It is submitted by the learned Advocate that there is no proof that accused No.1 was aware that accused No.3 was carrying a fire arm and that he would fire at the victim with the intention to kill. Reliance is placed by the learned advocate on the judgements in *Pandurang v/s. State of Hyderabad*, **AIR 1955 SC 216;** *Nanak Chand v/s. State of Punjab,* **AIR 1955 SC 274**; *Jaikrishnadas Manohardas Desai & Anr. v/s. State of Bombay,* **AIR 1960 SC 889;** *Parichhat v/s. State of M.P.,* **AIR 1972 SC 535;** *Shri Ram v/s. State of U.P.,* **AIR 1975 SC 175**; *Trilok Chand Jain v/s. State of Delhi,* **AIR 1977 SC 666**; *Bhaiyan & Anr. v/s. The State of Madhya Pradesh,* **AIR 1978 SC 36; and** *Saju v/s. State of Kerala,* **(2001) 1 SCC 378**.

According to the learned Advocate, unless there is sufficient proof on record to establish that there was a common intention between accused Nos.1 and 3 to kill the victim, the prosecution cannot resort to section 34 of the Indian Penal Code in order to rope in accused No.1 and prove that he was guilty under section 302 of the Indian Penal Code.

9. The learned Assistant Public Prosecutor relies on the judgement of the Supreme Court in *Rajesh Govind Jagesha v/s. State of Maharashtra*, **AIR 2000 SC 160**. This judgment stipulates that section 34 of the Indian

Penal Code will be attracted only when it is established that a criminal act was done by several persons, that they had a common intention and a prearranged plan to commit an offence and that there was participation by the accused in the commission of the offence in furtherance of that common intention. The actual physical participation or presence at the scene of offence is not necessary for section 34 to be attracted. The common intention can develop even during the course of occurrence of a crime. It is not necessary that there should be direct evidence of common intention. Such an intention can also be inferred. In the case of *Shri Ram (supra)*, the Supreme Court while dealing with an offence under section 107 of IPC has held in para 6 thus:

> 6. ... Thus, in order to constitute abetment, the abettor must be shown to have "intentionally" aided the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of Section 107. A person may, for example, invite another casually or for a friendly purpose and that may facilitate the murder of the invitee. But unless the invitation was extended with intent to facilitate the commission of the murder, the person inviting cannot be said to have abetted the murder. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime. Intentional aiding and therefore active complicity is the gist of the offence of abetment under the third paragraph of Section 107.

10. However, while considering the provisions of

section 34, IPC in a later judgment, the Supreme Court has held in *Rajesh Govind Jagesha (supra)* as follows:

> "7. ... No pre-meditation or previous meeting of mind is necessary for the applicability of Section 34 of the IPC. The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purposes of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence." ....

11. In the present case, it is obvious that the role ascribed to accused No.1 is that of riding the motor cycle with accused No.3 as the pillion rider and fleeing from the scene of offence with accused No.3 on the motor cycle. There is no active participation by him in the actual firing of shots at the victim. However, it can be inferred from the conduct of accused No.1 that he and accused No.3 had a common intention to kill the victim. He brought accused No.3 to the site on his motor cycle, kept the engine running while accused No.3 fired the shots at the victim, turned the motor cycle around to face Mumbra and sped away with accused No.3 after the offence was committed. Thus, it can be inferred that

accused No.1 was equally involved with the offence.

12. In the result, the Appeals fail. The impugned judgement and order of the trial Court is upheld. Appeals dismissed.

13. In view of the disposal of the Appeals, Criminal Application No.3337 of 2004 for Bail does not survive and the same is disposed of accordingly.

(D.G. DESHPANDE, J.)

(SMT.NISHITA MHATRE, J.)